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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-949

MARY AKIN, *et al*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATE OF ARIZONA
Bruce Babbitt, Attorney General
159 State Capitol
Phoenix, Arizona 85007

STATE OF CALIFORNIA
Evelle J. Younger, Attorney General
Fifth and Capitol Mall
Sacramento, California 90012

STATE OF IDAHO
Wayne L. Kidwell, Attorney General
State Capitol
Boise, Idaho 83702

STATE OF KANSAS
Curt T. Schneider, Attorney General
State House
Topeka, Kansas 66612

STATE OF MONTANA
Robert L. Woodahl, Attorney General
Capitol Building
Helena, Montana 59601

STATE OF NEBRASKA
Paul L. Douglas, Attorney General
State Capitol
Lincoln, Nebraska 68509

STATE OF NEVADA
Robert List, Attorney General
Supreme Court Building
Carson City, Nevada 89701

STATE OF NEW MEXICO
Antonio Anaya, Attorney General
Supreme Court Building
Santa Fe, New Mexico 87501

STATE OF NORTH DAKOTA
Allen I. Olson, Attorney General
State Capitol
Bismarck, North Dakota 58501

STATE OF OKLAHOMA
Larry Derryberry, Attorney General
State Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
R. Lee Johnson, Attorney General
State Office Building
Salem, Oregon 97310

STATE OF SOUTH DAKOTA
William J. Janklow, Attorney General
State Capitol
Pierre, South Dakota 57501

STATE OF TEXAS
John L. Hill, Attorney General
Capitol Station
Austin, Texas 78711

STATE OF UTAH
Vernon B. Romney, Attorney Gneral
State Capitol
Salt Lake City, Utah 84114

STATE OF WASHINGTON
Slade Gorton, Attorney General
Temple of Justice
Olympia, Washington 98501

STATE OF WYOMING
David B. Kennedy, Attorney General
Capitol Building
Cheyenne, Wyoming 82002

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I. INTRODUCTION

The States appearing as signatories on this amici curiae brief respectfully request this Court to issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the case captioned below as *United States of America v. Mary Akin, et al.*, Case No. 73-1807, reported at 504 F.2d 115 (1974) (attached hereto as Appendix A). The United States District Court for the District of Colorado issued oral findings of fact and conclusions of law, a transcript of which is attached hereto as Appendix B. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by the United States Court of Appeals on November 12, 1974. A Petition for Writ of Certiorari was filed with this Court on or about February 1, 1975 by the Attorney General of the State of Colorado.

A. THE COURT'S HOLDING

The United States Court of Appeals for the Tenth Circuit held that the doctrine of abstention did not support the United States District Court's dismissal of the complaint of the United States seeking an adjudication of its claim for water rights in the San Juan River Basin of Colorado. The Court further held that 43 U.S.C. §666 (the McCarran Amendment) did not divest the Federal District Court from assuming jurisdiction over water rights adjudications.

B. THE INTEREST OF THE STATES NAMED HEREIN

Amici curiae believe that this case presents solemn issues regarding the delicate relationship between the federal government and the individual states. The resolution of the questions of the applicability of abstention and comity will have precedential impact beyond the boundaries of the State of Colorado. Additionally, this case may have adverse consequences upon the water right determination and administration processes in all the Western States.[1] The potential harm of the Court of Appeals' decision and the importance of the issues involved herein are the bases for the appearance of amici curiae to pray that a writ of certiorari be issued.

As the settlement of the West progressed, the States named herein as amici curiae developed comprehensive and prudent systems for the determination and administration of water rights. The scarcity of this keystone resource compelled state action to insure certainty and efficiency in the establishment of water rights and in the regulation of the exercise of those rights. Although the doctrine of prior appropriation is the bedrock of the Western States' de-

[1] Since the reserved water rights theory has no application in the State of Texas, it joins as an amicus curiae for the sole purpose of upholding the doctrines of abstention and comity.

signs, divergent economic and political policies and the particularities of the water situations in each state have led to a variety of individual systems. Generally, these designs for water right determination and administration reflect a degree of sophistication achievable only after decades of trial and error and of legislative and judicial development.

If the decision of the Court of Appeals is allowed to stand, the federal judicial system will become a second forum for the determination and administration of water rights. The special and peculiar capabilities of all the Western States' schemes will be undermined by the existence of this separate and distinct process.

Comity is also an issue of significance to all the States named herein. In appropriate situations, the doctrine of comity may alone be sufficient basis for deference of jurisdiction to a pending state proceeding. The Court of Appeals failed to consider comity as a ground for dismissal even though it recognized that the District Court had, in part, dismissed the complaint because of comity. Comity identifies the concept that federal courts should give consideration to the sovereign status of the individual states. The States are concerned with the balance between state jurisdiction and federal jurisdiction; thus, the recognition of comity as a proper basis for dismissal of this action is an additional interest of amici curiae.

The issue of abstention is also of primary importance to the States named herein as amici curiae. The doctrine of abstention holds that federal courts may exercise their discretionary equitable powers and refuse jurisdiction in certain cases. Recognition of the proper exercise of the doctrine of abstention is vital to healthy federal-state relations. The States have utmost concern that the doctrine of abstention be preserved in its full scope.

The interests of the Western States, which involve cardinal issues of federalism and concern the future regulation of the essential resource of water support the issuance of a writ of certiorari.

C. THE ADVERSE EFFECT OF THE COURT'S DECISION

The decision of the Court of Appeals of the Tenth Circuit divides the water right determination and administration procedure between two forums. The state system will lose much of the certainty, utility, and valuable intactness that has developed over decades of experience. For the first time, the federal district courts will be burdened with developing an adequate procedure for determining and administering water rights. There is no sound reason for circumventing the state systems and clogging the federal courts with these complex and cumbersome matters. The efficiency and reliability so necessary to assure the wise use of the limited resource of water will be eradicated. Duplicative determination forums not only create uncertainty and waste but also place unnecessary burdens on the states in administering their waters and on individuals who must suffer the extra time and expense of defending their water rights in federal court.

Assumption of jurisdiction by the federal judiciary forebodes chaos in water right administration. Water rights are interrelated, and frequently day to day management of the rights to this fluctuating and limited resource is required. The federal court will be confronted with numerous and complex administrative problems including perplexing jurisdictional difficulties in regard to rights, orders, and administrative decisions emanating from the state system. The authority and definiteness of the state process will be impaired by the presence of federally-created rights and the jurisdictional barriers surrounding

those rights. Further federal-state jurisdictional battles are sure to ensue and the allocation and management of water may suffer through years of incertitude.

In light of the importance of water to the Western States, this threat of confusion should be quickly extinguished by withholding federal jurisdiction and permitting the state forum to proceed. The Supreme Court of the United States should issue a writ of certiorari in order to forestall the potential damage to the water right determination and adjudication systems of all the Western States.

In holding that the doctrine of abstention does not support dismissal of the federal action, the Court of Appeals misconceived the dimensions of abstention and adopted a constricted and partial view of the doctrine. Should this decision be allowed to stand, it will mark a serious departure from the well-established applications of the doctrine and may lead to further duplications and disruptive controversies in the federal-state jurisdictional area outside of water matters.

Lastly, the decision of the United States Court of Appeals is in derogation of the long-standing federal policy of deference to state governments in water matters. If this decision is allowed to stand, the doctrine of comity will be dealt a near fatal blow and the door will be open to more frequent and more intense federal-state disputes. A writ of certiorari should be granted in order that this Court may consider the deleterious impact of the decision below.

II. JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 2, 1974. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on November 12, 1974, and a petition for Writ of Certiorari was filed by the Attorney Gen-

eral of the State of Colorado within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

III. QUESTION PRESENTED

Should a federal district court defer to a competent state forum the resolution of federal water right claims which are capable of complete determination and administration in a state proceeding?

IV. STATUTORY PROVISIONS INVOLVED

43 U.S.C. § 666, 66 Stat. 560, commonly referred to as the McCarran Amendment, reads as follows:

> 666. Suit against the United States.—(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit

shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of the States to the use of the water of any interstate stream. (July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.)

Also involved is the Colorado Water Right Determination and Administration Act of 1969, Colorado Revised Statutes 1973, 37-92-101, *et seq.*, as amended, and to the extent of the amici curiae's participation, the statutory water right determination and administration designs of each of the individual states are relevant.

V. STATEMENT OF THE CASE

This is a water right case which was instituted on November 14, 1972, by the United States in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1345. It seeks the adjudication of all water rights in the San Juan River Basin in Colorado held by the United States in its own capacity and as trustee for the Ute Mountain Ute and the Southern Ute Indian Tribes and, in particular, the adjudication of all the claimed reserve water rights of the United States. Additionally, the United States prays for the appointment of a Water Master to administer the respective rights of all users in the waters adjudicated.

The reserved water rights asserted by the United States are or may be used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation Projects within the State of Colorado, and lands reserved

by the United States including the Indian Reservations in Colorado.

There are approximately twelve hundred named defendants and the following intervening defendants: The Colorado River Water Conservation District, the City and County of Denver by its Board of Water Commissioners, the Southwestern Water Conservation District, The Mancos Water Conservancy District and the Southeastern Colorado Water Conservancy District. The Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, and the National Tribal Chairmen's Association appeared as amici curiae by the Native American Rights Fund.

Pursuant to the McCarran Amendment, the Southwestern Colorado Water Conservation District joined the United States in a pending Colorado water court adjudication on January 3, 1973. The state proceeding is fully capable of adjudicating all the water right claims which the United States sought to advance in federal court. Additionally, Colorado has a comprehensive design for the administration of all water rights. The United States is presently involved in seven state court actions in Colorado adjudicating claims similar to those asserted in the instant case pursuant to state procedure.

After consideration of the practicality and expertise of the Colorado forum and the harm involved in the assumption of jurisdiction, the United States District Court dismissed the action brought by the United States on the grounds of abstention and comity. The judgment rendered by the district court was reversed by the United States Court of Appeals for the Tenth Circuit on the ground that this case was outside the narrow areas in which the doctrine of abstention may be exercised. A Petition for Rehearing and Suggestion for Rehearing *en banc* by various intervening defendants was denied by that court on November 12, 1974.

VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. COMITY COMPELS DISMISSAL OF THIS ACTION BECAUSE THE ASSUMPTION OF JURISDICTION BY THE DISTRICT COURT WOULD HAVE A SIGNIFICANTLY ADVERSE IMPACT UPON FEDERAL-STATE RELATIONS.

1. *A state proceeding fully capable of adjudicating federal water claims is pending. The assumption of federal jurisdiction complicates, confuses and harms the historic determination and administration of water rights by state processes.*

If the true dimensions of the concept of comity are to be given full breadth, comity must be sustained as an appropriate basis for the dismissal of this suit. Comity permits a federal district court to repair the parties to a state court proceeding when the refusal of jurisdiction by the federal court will enhance federal-state relations. The doctrine is an inherent product of the federalistic nature of the governmental system of the United States of America.

> ". . . the notion of 'comity,' that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by man as "Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of

> 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. *What the concept does represent is the system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.* It should never be forgotten that this slogan, 'Our Federalism,'' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.'' [Emphasis added.] *Younger v. Harris,* 401 U.S. 37, 44-45 (1971).

When the executive branch of the Federal government fails to respect ''Our Federalism'' and the rightful role of state forums in water matters is ignored, the federal judiciary should use the doctine of comity to avoid the theatened injury to federal-state relations.

Exercising their sovereign powers, the various states of our Union have adopted their own water right determination and administration systems. State procedures, either administrative or judicial, have been the almost exclusive method for the determination of water rights including rights of the United States of America. Many of these systems, like that of Colorado, have evolved out of a century or more of experience in water right affairs and are responsive to the hydrological conditions, economic and social factors, and the special problems of each of the states.

The federal government does not have a system of

water right determination. It has followed a concerted course of action in deferring to state law and state forums in water right matters. Numerous statutes, Congressional actions, administrative policies, and judicial decisions reflect a national policy of establishing and administering federal water rights within the state water right systems. See, *In re Green River Drainage Area,* 147 F. Supp. 127 (D. Utah 1956) and the citations therein at 145. Such deference has created a largely harmonious, cooperative, effective working relationship between the state governments and the central sovereign in water matters. Unless the doctrine of comity is respected and the exercise of comity is permitted in this case, the concordance of the states and the federal government in water right determination matters will be severely threatened.

2. *The McCarran Amendment, as this Court acknowledged, expresses a national policy that state forums be utilized for the determination and administration of federal water rights.*

The historic deference of the federal government to state procedures in water right matters was supported and advanced in *United States v. District Court in and for the County of Eagle* (hereinafter *Eagle County*), 401 U.S. 520 (1971), and its companion case *United States v. District Court in and for Water Division No. 5* (hereinafter Division 5), 401 U.S. 527 (1971). After consideration of the McCarran Amendment and its legislative history, the Supreme Court of the United States held that even the reserved right claims of the United States could be adequately adjudicated in Colorado's courts despite the potential inconsistencies between the federal claims for those rights and Colorado state law. These prudent holdings avoided the obviously adverse consequences which result from the bifurcation of the water right determination pro-

cedure. The holding of the United States Court of Appeals is a severe retrogression from the enlightened position enunciated in *Eagle County* and *Division 5* and is unwarranted.

The McCarran Amendment, 43 U.S.C. § 666, furthers the concept of comity. It permits the joinder of the United States in state water adjudications thus promoting the utility of the state proceedings by assuring that *all* the parties owning or in the process of acquiring water rights on a particular stream will be before the court. The Court of Appeals' decision in the instant case promotes the circumvention of the McCarran Amendment and effectively destroys it. Over the past century, the entire fabric of western development and, in particular, agicultural, industrial, municipal and domestic activities have become dependent upon the orderly determination of the relative priority of water rights and the administration of those rights from day to day in accordance with the highly varible, and sometimes almost nonexistent, supply of water. To force the federal court to institute an unnecessary, duplicative and burdensome proceeding ignores the policy of comity and vitiates the intent of the McCarran Amendment.

The McCarran Amendment also permits the joinder of the United States for the administration of water rights in state forums. Thus Congress has enunciated an all-inclusive policy that all facets of federal water claims and water rights are within the purview of the state processes. When contrasted with the absence of any federal administrative experience or design, the McCarran Amendment may properly be interpreted as a statement of intent to favor the utilization of state forums for the determination and administration of federal water claims.

If the United States District Court is forced to ignore the doctrine of comity and to assume jurisdiction in this

case, all of the unitary water right determination systems of the Western States may be jeopardized. The scarcity of water in the arid and semiarid western States dictates that a water allocation scheme provides freedom from the doubts and disorders which could result from a bifurcated process. The interference of the federal judicial process in the determination and administration of water rights is antithetical to the efficiency, reliability and integrity present in the state schemes. In part, the success of these state systems has derived from the cooperation of the federal government based on both statutory requirements and sensible administrative decisions. The benefits of the unitary state schemes which have fostered harmonious relations in the controversial area of water right determination should not be cast aside by the assumption of jurisdiction. A rightful respect for the functions of state government compels the application of the doctrine of comity to dismiss the federal government's action.

B. THE COURT OF APPEALS ERRED BY SO NARROWLY DEFINING THE ABSTENTION DOCTRINE. A MULTITUDE OF FACTORS SUPPORT THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION TO ABSTAIN.

The doctrine of abstention vests with the federal court the discretionary authority to dismiss an action even though the court is possessed of requisite jurisdiction. Abstention shares many of the considerations of comity but may be invoked for reasons other than comity. The landmark abstention decision is *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Two of the fundamental legal principles of the doctrine as enunciated in *Pullman, supra,* are relevant to this case. First, the power to stay or defer action is to be exercised in furtherance of fostering the harmonius relations between state and federal authorities. Second, in the absence of a show-

ing that the state adjudicatory process cannot be pursued with full protection of the claims, the court should exercise its discretion to stay its hand.

The decisions which have followed *Pullman, supra,* have given greater breadth to the doctrine of abstention. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), noted the appropriateness of abstention when an adequate and comprehensive state regulatory system existed. When the federal right is "entangled in a skein" of a state regulatory system, abstention has been common. *Gay v. Board of Registration Commissioners,* 466 F.2d 879, 884 (6th Cir., 1972); *See, Alabama Public Service Commissioners v. Southern Railway Co.,* 341 U.S. 341 (1951). The Federal water claims are indisputably entangled in the law and the regulatory system of the state. *United States v. Hennen,* 300 F. Supp. 256 (D. Nev. 1968); *Avondale Irrigation District v. North Idaho Properties, Inc.,* 96 Idaho 1, 523 P.2d 818 (1974).

Furtherance of "cooperative judicial federalism" may be the sole ground upon which abstention may be exercised. *Lehman Bros. v. Schein,* — U.S. —, 94 S.Ct. 1741 (1974); *Alabama Public Service Comm. v. Southern Railway Co.,* 341 U.S. 341 (1951); *Simmons v. Jones,* 478 F.2d 321 (5th Cir. 1973); *Indiana State Employees Association, Inc. v. Boehning,* 357 F. Supp. 1374 (S.D. Ind. 1973). However, numerous other rationales which are also present in the instant case have been cited as supporting the invocation of the abstention doctrine:

1. The subject matter of the lawsuit is an unique state resource which is of great concern to the state. *Kaiser Steel Corp. v. W. S. Ranch Co.,* 391 U.S. 593 (1968); *Union Water Supply Corp. of Garciasville v. Vaughn,* 355 F. Supp. 211 (S.D. Tex. 1972)

2. The complexity of the subject matter and the cap-

ability and historic expertise of the state system. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941).

3. The pendency of a parallel state proceeding. PPG *Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1973); *Indiana State Employees Assoc., Inc. v. Boehning*, 357 F. Supp. 1374 (S.D. Ind. 1973).

4. The onerous effects of jurisdiction upon the federal docket and judicial resources. [WRIGHT, LAW OF FEDERAL COURTS (2d ed. 1970) at 196.]

In opposition to these factors, the United States asserted only its victory in the race to the courthouse and the advancement of a national interest. The inherent value of the courthouse race is meaningless and artificial in comparison with the substantive factors cited above. The claim that the assertion of a national interest makes abstention inappropriate is vitiated by the United States Supreme Court's declaration that the Colorado State system is fully adequate to hear all federal water right claims, *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971).

Although abstention is a doctrine of limited application, it should not be so narrowly interpreted as to be decimated. The Court of Appeals failed to appreciate that this case constitutes a federal interference with a state regulatory scheme as in *Burford, supra.* The issues of the case concern the existence, scope and nature of federal reserved water right claims in Colorado and, since rights created under state law are before the court, important and novel questions of state law are presented as in *Kaiser, supra.* The Court of Appeals erred not only by restricting abstention to such limited areas but by failing to realize that

abstention is supportable even within the limited areas it delineated.

The doctrine of abstention is a necessary tool to facilitate a proper balance between the jurisdictional spheres of the federal and state governments. Where a state's regulatory system provides sophisticated procedures for determining and administering all water rights, and absolutely no system exists at the federal level, a federal court should abstain. Additionally, the entanglement of the federal claims and state law, the importance of water as an unique state resource, the complexity of the regulatory system, the avoidance of a prolonged, complex litigation in federal court, and the existence of a state proceeding all urge the application of abstention in this case. The scales of justice are decidedly tipped in favor of abstention.

CONCLUSION

The undersigned States respectfully submit that the United States Court of Appeals for the Tenth Circuit erred in its view of the doctrine of abstention as applied to this case and further erred by not considering the doctrine of comity. Both of these important legal principles support the Federal District Court's dismissal of this action.

Water right determination is a paramount state concern. The unique systems developed by the states should not be frustrated by the interference of the federal courts, especially when the doctrines of comity and abstention are so particularly appropriate as bases for dismissal of the federal action. The magnitude of the federal-state issues involved and the importance of water-right systems to the states evidence the significance of this case. It is respect-

fully submitted that this Court should issue its Writ of Certiorari to review the judgment of the United States Court of Appeals.

Respectfully submitted,

STATE OF ARIZONA
Bruce Babbitt, Attorney General
159 State Capitol
Phoenix, Arizona 85007

STATE OF CALIFORNIA
Evelle J. Younger, Attorney General
Fifth and Capitol Mall
Sacramento, California 90012

STATE OF IDAHO
Wayne L. Kidwell, Attorney General
State Capitol
Boise, Idaho 83702

STATE OF KANSAS
Curt T. Schneider, Attorney General
State House
Topeka, Kansas 66612

STATE OF MONTANA
Robert L. Woodahl, Attorney General
Capitol Building
Helena, Montana 59601

STATE OF NEBRASKA
Paul L. Douglas, Attorney General
State Capitol
Lincoln, Nebraska 68509

STATE OF NEVADA
Robert List, Attorney General
Supreme Court Building
Carson City, Nevada 89701

STATE OF NEW MEXICO
Antonio Anaya, Attorney General
Supreme Court Building
Santa Fe, New Mexico 87501

STATE OF NORTH DAKOTA
Allen I. Olson, Attorney General
State Capitol
Bismarck, North Dakota 58501

STATE OF OKLAHOMA
Larry Derryberry, Attorney General
State Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
R. Lee Johnson, Attorney General
State Office Building
Salem, Oregon 97310

STATE OF SOUTH DAKOTA
William J. Janklow, Attorney General
State Capitol
Pierre, South Dakota 57501

STATE OF TEXAS
John L. Hill, Attorney General
Capitol Station
Austin, Texas 78711

STATE OF UTAH
Vernon B. Romney, Attorney Gneral
State Capitol
Salt Lake City, Utah 84114

STATE OF WASHINGTON
Slade Gorton, Attorney General
Temple of Justice
Olympia, Washington 98501

STATE OF WYOMING
David B. Kennedy, Attorney General
Capitol Building
Cheyenne, Wyoming 82002

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

MARY AKIN ET AL.,

Defendants-Appellees.

No. 73-1807

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Submitted Aug. 19, 1974.

Decided Oct. 2, 1974.

Rehearing Denied Nov. 12, 1974.

Walter Kiechel, Jr., Deputy Asst. Atty. Gen. (Wallace H. Johnson, Asst. Atty. Gen., and Edmund B. Clark, Donald W. Redd, and Lawrence E. Shearer, Attys., Dept. of Justice, Washington, D.C., on the brief), for plaintiff-appellant.

John E. Bush, Deputy Atty. Gen. (John P. Moore, Atty. Gen., Clyde O. Martz, Raphael J. Moses, and James D. Geissinger, Special Asst. Attys. Gen., on the brief), for defendants-appellees The State Board of Agriculture and The Colorado Game and Fish Commission (Colorado Wildlife Commission and Colorado Board of Parks and Outdoor Recreation).

L. W. McDaniel, Durango, Colo., on the brief for defendant-appellee Southwestern Water Conservancy District.

Fairfield & Woods and Ireland, Stapleton, Pryor & Holmes, P. C., Denver, Colo., on the brief, for defendant-

appellee Mancos Water Conservancy District.

Fairfield & Woods, Denver, Colo., on the brief for defendant-appellee Southeastern Colorado Water Conservancy District.

Kenneth Balcomb, Glenwood Springs, Colo., for intervenor-appellee Colorado River Water Conservation District.

Thomas W. Fredericks, David H. Getches and Robert S. Pelcyger, Attys., Native American Rights Fund, Boulder, Colo., on the brief of amici curiae Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe and National Tribal Chairmen's Association.

George L. Zoellner, Kenneth L. Broadhurst, Glenn Saunders, Special Counsel and Jack Ross, Special Counsel, Denver, Colo., on the brief, for defendant-appellee City and County of Denver, acting by and through its Board of Water Commissioners.

Before HILL and DOYLE, Circuit Judges, and TALBOT SMITH*, District Judge.

WILLIAM E. DOYLE, Circuit Judge.

The questions presented in this appeal are, first, whether or not the District Court had jurisdiction to entertain this action which was instituted by the United States on its own behalf and on behalf of certain Indian tribes, or, secondly, assuming that the District Court had jurisdiction, whether the court should have abstained.

This is a water rights case which was instituted by the United States in the United States District Court for the District of Colorado. The action was brought on behalf of the United States and on behalf of the Ute Mountain and

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*Honorable Talbot Smith, United States District Judge, Ann Arbor, Michigan, sitting by designation.

Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Mounment, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.** In this action the plaintiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran

**It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

The United States District Court's dismissal of the action was on the ground of the abstention doctrine and for reasons of "comity." In effect, therefore, the court's assumption was that it had jurisdiction.

Thus, the primary issue is whether the trial court erred in its decision to abstain. Inasmuch as the defendants-appellees also contend that the District Court lacked jurisdiction to hear the case, we shall take up that issue also.

I.
THE JURISDICTION QUESTION

The United States has alleged that jurisdiction in District Court was conferred by 28 U.S.C. § 1345 which gives to district courts original jurisdiction of all civil actions commenced by the United States except as otherwise provided.

The Colorado River Water Conservation District takes the position that 43 U.S.C. § 666, the McCarran Amendment, which gives consent to joinder of the United States "in any suit for the adjudication of rights to the use of water," etc.,[1] not only gives a state court jurisdiction over

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[1] The full text of this section reads as follows:
Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

the United States, it also, according to their further argument, excludes federal courts from assuming jurisdiction. We disagree.

The starting point in this analysis is Article III of the United States Constitution which extends the judicial power to controversies to which the United States shall be a party. Although this provision is not self-implementing, it does evidence the intention of the Framers to allow the United States to sue in its own courts. The statute, § 1345, *supra*, confirms this right of the United States.[2]

The rationale for the right of the United States to sue in federal court is expressed by Mr. Justice Story in his work, Story, The Constitution § 1674:

> It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the states.

The right was recognized from the earliest days in our history. The Judiciary Act of 1789 gave the district courts jurisdiction concurrent with that of the state courts "of all suits of a civil nature at common law or in equity," subject to a jurisdictional amount. The clear right of the United States to maintain actions asserting proprietary rights is discussed in H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at

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[2] Section 1345, supra, provides:
§ 1345. United States as plaintiff
Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil action, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

1301-09. The authors cite Cotton v. United States, 11 How. 229, 13 L.Ed. 675 (1850) as an example of the right of the United States to bring an action even without an authorizing statute. That was a trespass case.

With respect to the cases in which the government asserts a proprietary right, the authors say:

> The most striking recent examples of the assertion of proprietary rights of the United States, illustrating the magnitude of the interests that may be involved, were the much-disputed tidelands cases. Compare the motion of the United States for leave to intervene in Nebraska v. Wyoming, 304 U.S. 545 [58 S.Ct. 1035, 82 L.Ed. 1519] (1938). See Comment, Federal Fallbrook Case, 31 Tex.L.Rev. 404 (1953). See also the cases growing out of the oil scandals of the Harding administration. Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 [47 S.Ct. 416, 71 L.Ed. 734] (1927); Mammoth Oil Co. v. United States, 275 U.S. 13 [48 S.Ct. 1, 72 L.Ed. 137] (1927).
>
> Closely related to the proprietary cases are those in which the United States has established its status as guardian of the Indian tribes and its standing in litigation to vindicate Indian rights. See *e.g.*, Heckman v. United States, 224 U.S. 413 [32 S.Ct. 424, 56 L.Ed. 820] (1912); United States v. Board of Comm'rs of Osage County, 251 U.S. 128 [40 S.Ct. 100, 64 L.Ed. 184] (1919); Cummings & McFarland, Federal Justice 250-317, 384-413 (1937).

H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1302.

[1] The McCarran Amendment does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water. It is said

by appellees that the original language of the Amendment contained a proviso which allowed the United States to remove to federal court any action in which it was a defendant within the scope of the waiver of sovereign immunity contained in the Amendment. The argument continues that since Congress dropped this proviso it follows that Congress intended to deprive the United States of its right to sue under § 1345. We disagree with the conclusion drawn. The McCarran Amendment merely allowed the United States to be *joined* in a state action in a case in which the United States owns water rights and is a necessary party to the suit. However, this falls short of furnishing by implication a repeal of § 1345 applicable to water cases. The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States. So, elimination of the removal proviso originally in the Amendment at most expressed congressional intent that where the United States is joined under the circumstances set forth in the Amendment it will not be allowed to frustrate the procedures in the state court. But the statute did not prohibit the United States from ever removing a water rights case to the federal court. If Congress had intended to force the United States to litigate its water cases in state courts, it could have done so by creating a water rights exception to § 1345. This it did not do either expressly or impliedly.[3]

The decisions in United States v. District Court,

[3] Senator McCarran himself stated that:

S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, 82d Cong., 1st Sess, at 9. See also United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed 2d 278 (1971); Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Nevada ex rel. Shamberger v. United States, 279 F.2d 699 (9th Cir. 1960).

County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971) and United States v. District Court, Water Division No. 5, Colo., 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed. 2d 284 (1971) do not support the appellees in their present contentions. The issue in both of these was whether the consent to suit of the United States by provision of the McCarran Amendment extended to reserved rights. The Supreme Court held that the Amendment did include this type of right and it followed that the United States could be joined as a *defendant* in a state water rights proceeding. But by so holding the Court did not impliedly say that the United States was prohibited from litigating its reserved water rights as a plaintiff in federal court. At most, it held that the McCarran Amendment authorized a concurrent jurisdiction with state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under § 1345, *supra*. This is far different from appellees' position that the Amendment prohibits the United States' litigation of these rights in federal court.

Nor does the decision of the United States District Court for the District of Utah in In re Green River Drainage Area, 147 F.Supp. 127 (D.Utah 1956) support appellees. This was a removal problem wherein the court held that the United States cannot automatically remove its water rights cases to federal court. The court conceded that the McCarran Amendment does not preclude such removal if it would otherwise be removable.

The Supreme Court in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963) considered a situation in which the United States was joined as a defendant in a private suit to determine water rights solely between certain private claimants and the United States. The Court held that the McCarran Amendment was not intended to apply to a private suit between the United States and a private party to determine conflicting water rights contentions.

We must then reject the notion that the McCarran Amendment partially repealed or modified § 1345, *supra*. This conclusion suggests that § 666 has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subjected to state jurisdiction.

II.
THE ABSTENTION QUESTION

Having concluded that the United States District Court's jurisdiction was unimpaired, the issue remains whether, considering the character of the case, the District Court was correct in its abstention stance. The Conservation Districts together with the Board of Water Commissioners, State Board of Agriculture and the Colorado Game and Fish Commission assert, of course, that abstention was proper. The United States complains that the court's action was erroneous.

It has been recognized from very early times that federal courts are not to decline the exercise of expressly granted jurisdiction. This principle was first expressed by Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). This oft-repeated statement was that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." On its face this concept conflicts with the abstention principle which is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

A. *Guidelines*

[2] It is, of course, fundamental that the doctrine of abstention is to be applied in narrowly limited special circumstances. *See* Zwicker v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967) (citing Propper v. Clark, 337 U.S. 472, 492, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). *See also* Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed. 2d 1163 (1959); Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

B. *Applicable Areas*

1. The Supreme Court placed it in perspective when it said that it is an extraordinarily narrow exception to the rule that a federal court has a duty to adjudicate a controversy presented to it over which it has jurisdiction. *See* County of Allegheny v. Frank Mashuda Co., *supra,* and *see* Meredith v. City of Winter Haven, *supra.* It is within this narrow scope that we examine the various cases which have applied the abstention principle.

One facet of the abstention doctrine is that which seeks to give a state court full opportunity to dispose of a case which is potentially governed by state law before entertaining it and deciding it as a constitutional law question. *See* Railroad Commission of Texas v. Pullman Company, *supra,* a case in which the parties being regulated sought an injunction against enforcement of an order of the state regulatory agency.

Ours is not a case which presents constitutional questions and state questions, both of which show capability for disposing of the case whereby the state decision could obviate the necessity for a constitutional law decision.

2. A second abstention category is exemplified in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87

L.Ed. 1424 (1943), which holds that federal courts are not to interfere with state regulatory schemes; that they are to refrain from anticipating a constitutional question and interfering with the state regulatory agency when it is engaged in administering state law. *See* Alabama Public Service Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951); Hawks v. Hamill, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933); 1A J. Moore, Moore's Federal Practice § 0.203 [1]; C. Wright, Law of Federal Courts 200 (2d ed. 1970).

Here the federal court is not short-circuiting or interfering with efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

3. A further recent application of abstention is in cases in which a novel and important issue of state law is presented. *See* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 88 S.Ct 1753, 20 L.Ed.2d 835 (1968). *Kaiser* was a New Mexico eminent domain and water case. It concerned alleged inconsistency between a New Mexico statute and the New Mexico Constitution. Based on the fact that this was a novel and highly important question for the State of New Mexico, it was ruled that abstention was there appropriate. This holding was not dissimilar from Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). *Compare* County of Allegheny v. Frank Mashuda Co., *supra*. The fact, however, that both *Kaiser* and our case involve water rights does not render *Kaiser* determinative.

C. *The Race to the Courthouse.*

[3] The Colorado litigants also argue strenuously that this case must not be determined by who wins the race to the courthouse. This is a recurring contention in

cases in which state and federal courts have concurrent jurisdiction over a property case. True, the race idea has no intrinsic attractiveness. At the same time, it must be recognized that priority of filing has validity in the situation in which concurrent jurisdiction exists. The priority of the court which first acquires jurisdiction over the subject matter is entitled to recognition, and where the plaintiff has selected the forum and has filed first, his right to try his case in that court is not to be lightly dismissed.

The priority principle is held to apply where a federal and state court have concurrent jurisdiction and the action is *in rem*. *See* Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935); Kline v. Burke Constr. Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922); Palmer v. Texas, 212 U.S. 118, 29 S.Ct. 230, 53 L.Ed. 435 (1909); Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); Gay v. Brierfield Coal & I. Co., 94 Ala. 303, 11 So. 353 (1891); Crosby v. Spear, 98 Me. 542, 57 A. 881 (1904); Rogers & B. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S.W. 57 (1896); 20 Am.Jur.2d, Vol. 20 § 135, p. 485. And so the priority factor is entitled to be weighed in the abstention scale.

D. *Effect on Abstention of United States as Plaintiff*

We next consider (on the decision to abstain) the effect of the presence of the United States as a party plaintiff in the action. There is a dearth of authoritative case law bearing directly on the point. The most helpful decision is that of the Supreme Court in Leiter Minerals v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). The essential issue in that case was whether the United States owned minerals on lands, the surface of which it owned. A private party had claimed the minerals

in a state court action against the lessee of the United States. Thereupon, the United States filed an action in the United States District Court for the Eastern District of Louisiana. It sought to quiet title and to enjoin the adverse claimant in state court from prosecuting its action. The section of the Judicial Code which prohibits injunctions against State Court actions, 22 U.S.C. § 2283, was interposed. But the Supreme Court held that it was inapplicable to the United States when it was the suitor. In reaching this result the statute was ruled to be ambiguous and not susceptible to imputing congressional intent to make it applicable to the United States.[4] The Court went on to hold that it was proper for the District Court to entertain the suit in the federal court ". . . and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment." The Court's prior decision in United States v. Bank of New York & Trust Co., 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936) in which an injunction had been denied, notwithstanding the presence of the United States as a party, was distinguished on its facts. There, it was pointed out, the United States was one of many claimants to a fund and was not different from any other litigant. However, in treating the United States differently in *Leiter* it was emphasized that the policy (of exempting the United States

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[4] The reasoning of the Court was:

There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, alone.

352 U.S. at 225-226, 77 S.Ct at 290-291.

from the anti-injunction statute) is more compelling where the United States seeks to advance a national interest.[5]

[4] The presence of the United States as a plaintiff seeking to establish rights which have a national and sovereign character is then a factor which militates strongly against the applicability of abstention.

[5] Finally, the counsel for the appellees urge that the Supreme Court's decision in United States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) justifies the trial court's decision to abstain. We have carefully considered this case and we are of the view that it does not consider the problem which is presented in the case at bar. The United States there sought through writ of prohibition in the Colorado Supreme Court to prevent the District Court for Eagle County, Colorado from asserting jurisdiction over it. This effort failed, but this case did not suggest a lack of jurisdiction of the federal district court in a federal district court in a suit instituted by the United States. Nor did it hold that the state court by virtue of § 666 had exclusive jurisdiction. Further, it did not hold nor even suggest that

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[5] The opinion distinguishes the situation where the United States is "like any private claimant":

Moreover, the Bank of New York case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed and that were in the hands of depositaries appointed by the state court. In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state litigation has the elements of an action characterized as quasi in rem. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in the federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment.

352 U.S. at 227-228, 77 S.Ct. at 292.

abstention by a federal court, the jurisdiction of which had been invoked, should be ordered.[6]

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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[6] The Court was careful to note that reserved water rights of the United States "are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court." 401 U.S. at 526, 91 S.Ct. at 1003.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-4497

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Defendants.
AKIN, MARY, et al.,

Reporter's Transcript of Court's Ruling

Proceedings before the HONORABLE SHERMAN C. FINESILVER, Judge, United States District Court for the District of Colorado, beginning at 2:00 p.m. on the 21st day of June, 1973, in Courtroom D, United States Courthouse, Denver, Colorado.

APPEARANCES

DONALD W. REDD, Esq., Department of Justice, Washington, D.C. and KENNETH J. BURKE, Esq., United States Department of Justice, Denver, Colorado.

JOHN BUSH, Deputy Attorney General, State Capitol Building, Denver, Colorado.

GLEN G. SAUNDERS, Esq., Capitol Life Center, Denver, Colorado.

KENNETH BALCOMB, Esq., Post Office Drawer 790, Glenwood Springs, Colorado, C.R.W.C.D.

JAMES GEISSINGER, Special Assistant to the Attorney General, State Capitol Building, Denver, Colorado.

RAPHAEL MOSES, Special Assistant Attorney General, State Capitol Building, Denver, Colorado.

CHARLES J. BEISE, Esq., 1536 First National Bank Building, Denver, Colorado.

D. MONTE PASCOE, Esq., 1700 Broadway, Suite 2017, Denver, Colorado.

HOWARD K. HOLME, Esq., First National Bank Building, Denver, Colorado.

PROCEEDINGS:

THE COURT: The record should reflect that we are proceeding in Civil Action 4497, United States of America vs. Mary Akin, et al. Starting with plaintiff's counsel, the Court would ask you to stand, and give us your name and who you represent, please.

MR. REDD: Donald W. Redd, from the Department of Justice representing the United States, Your Honor.

MR. BURKE: Kenneth J. Burke, United States Department of Justice, Denver, Colorado, representing the United States.

MR. BUSH: John Bush, Deputy Attorney General on behalf of the State Board of Agriculture and Colorado Game and Fish Department.

MR. SAUNDERS: Glenn G. Saunders, City and County of Denver, Board of Water Commissioners.

MR. BALCOMB: Kenneth Balcomb, Colorado River Water Conservation District and James D. Geissinger, Special Assistant to the Attorney General in connection with the Game and Fish and Department of Agriculture.

THE COURT: Mr. Moses?

MR. MOSES: Raphael Moses, Special Assistant to the Attorney General for the Game and Fish.

THE COURT: Who are some of the representatives for the Water Conservancy Districts.

MR. BEISE: Charles J. Beise, Southeastern Colorado Water Conservancy District and co-counsel for the Mancos Water Conservancy District.

MR. PASCOE: Monte Pascoe with John Rogers also co-counsel for the Mancos Water Conservancy District.

MR. HOLME: Howard K. Holme, Southwest Colorado Water Conservancy District and co-counsel for the Mancos Water Conservancy District.

THE COURT: Any other gentlemen who have—

MR. HARRISON: David Harrison with Mr. Moses who is representing the State of Colorado and the Special Attorney General.

THE COURT: The Court is considering this matter as a Motion to Dismiss. The Court has been favored with very extensive briefs on the legal issues and the respective contentions. As this Court sees the posture of this case, this is a civil action filed by the United States in order to have its rights and the rights of the Ute Mountain Ute and the Southern Ute Indian tribe in and to the waters of the Mancos, the La Plata, Animas, Florida, Los Pinos, Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado determined and declared. The jurisdiction of this Court is invoked under 1345 of Title 28 of the United States Code. The action lists between a thousand and fifteen hundred defendants in the case depending on what time of day you make the counting and to what degree you figure some of the names. The defendants also include other unknown claimants of interest to the water in these rivers and tributaries.

The Court's inclination is to apportion half an hour

a side. Mr. Bush, do you feel this is sufficient for the defendants to apportion to them?

MR. BUSH: If the Court could afford us a little more time, maybe forty minutes. There are only two that are going to argue.

THE COURT: Well, the Court will extend that to forty minutes a side, please, as the case might be.

Is this agreeable to you?

MR. REDD: The thirty minutes will be ample for us, Your Honor.

THE COURT: The Court will extend to the defendants forty minutes. The Court will entitle the plaintiffs the same period of time.

Mr. Bush, would you proceed, please.
(Argument by counsel.)

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THE COURT: This matter comes before the Court on the Motions to Dismiss or Reconsider in regard to—as filed by the defendants or intervenors in this case. Particularly, the defendants contest the jurisdiction of this Court to entertain the instant action and in any event, the defendants submit in general that the federal government should be compelled to proceed with this action in Division 7 of the state court or in the state courts.

The jurisdiction of this Court is purportedly invoked under Section 1345 of Title 28 United States Code. The plaintiff views this action as a suit in which the United States seeks to have its rights and concomitant priorities and the rights of the Ute Mountain Ute and the Southern Ute Indian tribes in and to the use of certain waters in the State of Colorado determined and declared.

The water in question is situated in the State of Colorado as described. At this time there are approximately 1,200 named defendants in this suit.

The Court views the following as the applicable law and statutes. First, the McCarran Amendment passed in 1952 designated as 43 United States Code Section 666 which provides for the joinder of the United States in a state court suit for the adjudication of water rights. Further the Water Rights Determination and Administration Act of 1969, Colorado Revised Statute 1963, Section 148-21-1 and other sections which provides a system for the adjudication of the waters of the natural streams in the State of Colorado. Also of considerable import is the case of *United States vs. Eagle County,* 458 P.2d 760, 169 Colo. 555 which was affirmed by the United States Court, 401 United States 510, 91 S.Ct. 998, 28 L.Ed. 2d 278. Also the companion case, *United States vs. District Court in and for Division No. 5,* 401 U.S. 527.

A pivotal issue involved herein and one which is worthy of comment is the McCarran Amendment and its underlying intent coupled with the decision of the Supreme Court in the Eagle County case determined that the adjudication of such matters, that is rights of the United States to the use of state waters, is solely a matter of state jurisdiction to the exclusion of the federal courts. This issue of jurisdictional exclusivity was not decided in the Eagle County case in the opinion of this Court or its companion case. Rather as we view these two authorities, the state court had jurisdiction under the McCarran Amendment and that 43 United States Code Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within the particular state's jurisdiction regardless of how the rights were required.

However, the nature and posture of this suit in the view of the Court does not necessitate that this Court make a determination as to the exclusiveness of jurisdiction of this matter. Rather the Court finds that the State of Colorado has a well defined, workable system for adjudication of water rights of all claimants; that the United States is not immune from suit in the state courts and the United States, as it is presently doing in other water rights suits in the state courts of Colorado, apparently the United States has filed claims in Divisions 4, 5 and 6, should initiate action in the appropriate state court.

Further the Court also notes that the United States has either been served or is in the process of being served in Water Division 7, the district in which adjudication of the instant rights are located.

Although the intention of the McCarran Amendment and the Supreme Court decisions on the matter of exclusive jurisdiction are not manifestly clear, they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The Court perceives a practical approach in this case. Aside from the strict legal interpretations, the Court envisions that a practical approach must recognize that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are practical impediments to requiring everyone in this particular area to litigate the matter in the federal courts.

Further the Court is satisfied from a practical approach that this would be perhaps an unreasonable burden

placed upon the citizens of Colorado and in attempting to locate individual water rights that the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The Court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.

The question that has also been presented is that perhaps the federal courts are best equipped to interpret and adjudicate federal law. However, we are satisfied that the federal courts are not the only forums under the obligation to enforce federal law. In our opinion, we should entertain jurisdiction only after the state court with its well defined expertise and considerable embodiment of law over the years, have had the opportunity to address itself to the issues inherent in this litigation. We have the question of comity between the courts. This is intertwined with the question of abstention. As we view it, comity is based on the discussion that the state can adequately vindicate federal rights and when this assumption proves incorrect, the federal courts may then act in a proper case and under applicable constitutional and federal law.

The Court for a totality of the reasons expressed under the doctrine of abstention or by comity in recognition of the presence of applicable and workable state law, we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the Indian tribes or any other individual litigants. To this end the Court is granting the defendants' Motion to Dismiss.

The Court reserves unto itself discretion and jurisdic-

tion to enlarge this opinion in this bench ruling as necessary within the period of 30 days and no appeal period will commence running until the end of that period. So it will not be necessary for the plaintiff, United States, in this case to file any Notice of Appeal. The Court will reserve unto itself a 30 day period in which to enlarge or modify this opinion. This does not mean that the Court, in fact, will do so. However, the Court will not consider this as a final judgment during this 30 day period.

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(Court in recess.)

REPORTER'S CERTIFICATE

I, E. J. CARPENTER, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colorado, this 17th day of July, 1973.

My Commission expires December 4, 1973.

E. J. Carpenter
Official Reporter